Supreme Court, U.S.
FILED
SEP 29 2004
OFFICE OF THE CLERK

No. 04-149

IN THE

Supreme Court of the United States

DEBORAH BAKER AND RICHARD ENYEART, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

IBP, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION

DAVID B. JOHNSON
ERIC S. MATTSON
EMILY A. MILY
SIDLEY AUSTIN BROWN & WOOD LLP
Bank One Plaza
10 S. Dearborn Street
Chicago, IL 60603
(312) 853-7000

VIRGINIA A. SEITZ*
BRIAN T. FITZPATRICK
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Respondents

* Counsel of Record

September 29, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that a union is a necessary party to a suit brought by the employees for whom it is the exclusive bargaining representative when the employees seek hourly wages different from those set in the collective bargaining agreement between the union and the employer.

2. Whether the court of appeals correctly held that petitioners failed to state a claim under RICO, 18 U.S.C. § 1962(c), where the "person" is alleged to have conducted its own affairs – and not the affairs of any alleged "enterprise" – through a pattern of racketeering activity.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTRODUCTION	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	5
I. THERE IS NO CONFLICT BETWEEN THE SIXTH AND SEVENTH CIRCUITS ON THE QUESTION WHETHER A UNION IS A NECESSARY PARTY IN THESE CIRCUMSTANCES	5
II. THE SEVENTH CIRCUIT'S ALTERNATIVE RICO HOLDING IS CORRECT AND DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT OF APPEALS	8
A. The Seventh Circuit Did Not Dismiss Petitioners' RICO Claim On The Ground That The Members Of The Enterprise Had Divergent Purposes	9
B. The Seventh Circuit Did Not Dismiss Petitioners' RICO Claim On The Ground That The Members Of The Enterprise Were Akin To A Family Of Corporations	12
C. Petitioners Agree That The Legal Rule Applied By The Seventh Circuit Is Correct (And Do Not Even Expressly Dispute Its Application)	13

TABLE OF CONTENTS – continued

Page

III. THIS COURT SHOULD NOT ABANDON ITS USUAL CRITERIA FOR CERTIORARI REVIEW BECAUSE THIS IS A CASE INVOLVING ILLEGAL IMMIGRATION 14

CONCLUSION 16

TABLE OF AUTHORITIES

CASES

	Page
Board of Governors v. *Dimension Fin. Corp.*, 474 U.S. 361 (1986)	15
Commercial Cleaning Servs., LLC v. *Colin Serv. Sys., Inc.*, 271 F.3d 374 (2d Cir. 2001)	10
EEOC v. *AT&T*, 506 F.2d 735 (3d Cir. 1974)	8
Forsberg v. *Pacific N.W. Bell Tel. Co.*, 622 F. Supp. 1147 (D. Or. 1985)	7
Hodgson v. *School Bd.*, 56 F.R.D. 393 (W.D. Pa. 1972)	7
Little Rock Sch. Dist. v. *Pulaski County Special Sch. Dist. No. 1*, 738 F.2d 82 (8th Cir. 1984)	8
Lynch v. *Sperry Rand Corp.*, 62 F.R.D. 78 (S.D.N.Y. 1973)	7
Rodriguez v. *United States*, 480 U.S. 522 (1987)	15
Sedima SPRL v. *Imrex Co.*, 473 U.S. 479 (1985)	10
Trollinger v. *Tyson Foods, Inc.*, 370 F.3d 602 (6th Cir. 2004)	1, 5, 6, 7
United States v. *Beasley*, 72 F.3d 1518 (11th Cir. 1996)	11
United States v. *City of L.A., Cal.*, 288 F.3d 391 (9th Cir. 2002)	8
United States v. *Jenkins*, 4 F.3d 1338 (6th Cir. 1993)	6
United States v. *Orena*, 32 F.3d 704 (2d Cir. 1994)	10, 11

STATUTES

8 U.S.C. § 1324(a)(3)	2
18 U.S.C. § 1962(c)	4

RULE

Fed. R. Civ. P. 19	3, 6, 7

TABLE OF AUTHORITIES – continued

OTHER AUTHORITY Page

7 Wright et al., *Federal Practice & Procedure* (3d ed. 2001) 7

INTRODUCTION

Petitioners erroneously claim that the decision below – which is a routine application of established legal rules under Fed. R. Civ. P. 19 and the Racketeer Influenced and Corrupt Organizations Act ("RICO") – creates two conflicts among the courts of appeals. With respect to Rule 19, the Seventh Circuit held that the union, which is the exclusive bargaining representative for hourly employees at respondent IBP, is a necessary party in a lawsuit to alter the terms and conditions of the collective bargaining agreement negotiated between that union and IBP. This is a routine and entirely correct application of Rule 19. See *infra* at 5-7. In the allegedly conflicting decision, the Sixth Circuit noted this issue, but did *not* decide it. It instead remanded the question, saying that "'[w]hether the Union should be joined . . . is . . . a matter for the District Court in the first instance.'" See *Trollinger* v. *Tyson Foods, Inc.*, 370 F.3d 602, 621 (6th Cir. 2004). Thus, no conflict exists.

Moreover, decision of the Rule 19 issue would not even resolve this case because it was only one of two independent grounds for the court's decision. Applying a rule of law that petitioners expressly endorse, see Pet. 12, the Seventh Circuit explained that to state a RICO claim, plaintiffs must allege that a "person" conducted the affairs of an "enterprise" through a pattern of racketeering activity. As petitioners acknowledge, the person and enterprise must be distinct. This is hornbook RICO law. The Seventh Circuit correctly held that IBP was accused of conducting its own affairs, not the affairs of any distinct enterprise, through alleged acts of racketeering.

Petitioners repeatedly mischaracterize the decision below – first, as adopting a rule that no RICO enterprise exists if the members of the enterprise have divergent purposes, and later as adopting a rule that no RICO enterprise exists because the

members of the enterprise are akin to a corporate family. Neither of these "holdings" appears in the Seventh Circuit's opinion. And petitioners never do business with the court's actual RICO holding requiring a separate RICO person and RICO enterprise – a requirement that reflects the established and uniform law in this area.

Finally, petitioners claim that enforcement of the immigration laws is so important that this Court must resolve the issue presented now and must interpret RICO in every particular in order to expand private immigration-law enforcement. This section of the petition is long on general information and short on reasons that would support this Court's review. The Court does not jettison its criteria for certiorari review because a case touches on immigration law, and neither question presented warrants review.

STATEMENT OF THE CASE

Respondent IBP owns a meat-processing facility in Joslin, Illinois. The employees of that facility are represented by an exclusive bargaining representative under the National Labor Relations Act ("NLRA"), and their wages are set by the collective bargaining agreement between their union and IBP. Pet. App. 10.

Petitioners are former employees of that facility. They sued IBP under RICO seeking to represent a class of current and former employees. Pet. App. 1. The only RICO predicate act alleged was that IBP knowingly hired illegal immigrants in violation of federal law, see 8 U.S.C. § 1324(a)(3)(A), Pet. App. 32. This allegedly depressed petitioners' wages by some $4 per hour. *Id.* at 2, 30, 35. They further alleged that IBP was in cahoots with immigrant welfare organizations to find the illegal immigrants it hired and that this "association-in-fact" was an illegal RICO enterprise. *Id.* at 12, 34. Their suit sought to recover lost wages on behalf of current and

former employees who were lawfully employed by IBP. *Id.* at 11, 24-36.

The district court dismissed the complaint without prejudice for lack of jurisdiction under Fed. R. Civ. P. 12(b)(1) on the ground that RICO claims for lost wages are within the primary jurisdiction of the National Labor Relations Board. Pet. App. 19, 23.

The Seventh Circuit disagreed with the basis of the district court's decision, and instead dismissed the complaint with prejudice for failure to state a claim under Fed. R. Civ. P. 12(b)(6). Pet. App. 13. The Seventh Circuit found two independent reasons to dismiss the complaint:

First, the court held that the suit could not go forward because the union representing the bargaining-unit employees at IBP was a necessary party to the suit and had not been joined thereto. Pet. App. 10-11; see also Fed. R. Civ. P. 19. The court noted that under the NLRA, the union is the "'exclusive'" representative of IBP employees with respect to wages and all other terms and conditions of employment. Pet. App. 10 (citing 29 U.S.C. § 159(a)). Moreover, under the NLRA, as amended by the Labor Management Relations Act, IBP is "legally required to pay at the rates specified by the collective bargaining agreement." *Id.* Thus, the court held that "[w]ithout the union as a party, the litigants could not settle this suit for higher hourly pay (or back pay) . . . nor could the judge order IBP to increase its rate of pay." *Id.* at 10-11. Accordingly, because petitioners sought compensation for lost wages, the union was a necessary party, and the suit could not go forward in its absence. *Id.* at 11.

In addition, the court held that, even if petitioners were "to add the union as a party and start [the suit] anew," Pet. App. 11, "there is another fatal problem in this complaint: specification of the [RICO] 'enterprise,'" *id.* The court noted, *id.*, that a "*person*" violates RICO only if he "conduct[s] or participate[s] . . . in the conduct of [an] *enterprise's* affairs

through a pattern of racketeering activity." 18 U.S.C. § 1962(c) (emphases added). The "person" alleged to have violated RICO – here IBP – must be distinct from the "enterprise," and it must be the enterprise whose affairs are being conducted through a pattern of racketeering activity. Pet. App. 11-12 (citing cases).

The court stated that "the complaint comes perilously close to alleging that IBP plus its agents and employees is the 'enterprise,' a theory that won't fly." Pet. App. 12 (citing cases). And the court further noted that it was "not altogether clear how th[e alleged] 'association-in-fact' has a common purpose." *Id.* But, the court gave petitioners a pass on both of these questions and assumed the successful allegation of an association-in-fact enterprise. *Id.*

The court held, however, that IBP was not operating or participating in the affairs of the alleged enterprise through a pattern of racketeering activity. This was because the only "racketeering activity" alleged was the hiring of undocumented workers, an activity performed by IBP alone. In light of this allegation, there was no difference between the "person" alleged to have violated RICO – IBP – and the "enterprise" alleged to be conducted through racketeering activity; IBP was the only entity alleged to have committed the predicate offense of "hir[ing], harbor[ing], and pay[ing] the unlawful workers," Pet. App. 12. Thus, as the court concluded, "[t]he nub of the complaint is that IBP operates *itself* unlawfully"; and "[w]ithout a difference between [IBP] and the 'enterprise' there can be no violation of RICO." *Id.*

Petitioners sought rehearing en banc which the court denied.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT BETWEEN THE SIXTH AND SEVENTH CIRCUITS ON THE QUESTION WHETHER A UNION IS A NECESSARY PARTY IN THESE CIRCUMSTANCES.

Petitioners contend that the Seventh Circuit's decision that the union is a necessary party to a suit seeking to modify the terms of a collective bargaining agreement conflicts with the Sixth Circuit's recent decision in *Trollinger* v. *Tyson Foods, Inc.*, 370 F.3d 602 (6th Cir. 2004). Pet. 5-7. Petitioners are wrong. The Sixth Circuit has never decided this issue, and the Seventh Circuit's dismissal of this case rested not only on Fed. R. Civ. P. 19, but also on wholly independent, adequate grounds. No conflict between this case and *Trollinger* exists.

Like the decision below, *Trollinger* involved a RICO suit alleging that an employer had depressed wages by knowingly hiring illegal immigrants, 370 F.3d at 606. The Sixth Circuit noted the existence of the question whether the union was a necessary party, *id.* at 620-21. That court, however, did *not* disagree with the Seventh Circuit and hold that the union was not a necessary party. In fact, the Sixth Circuit *did not decide this question at all*. Instead, observing that the defendant had not raised the issue until after the court had heard oral argument, the court remanded the case to the district court for resolution of the question in the first instance. As the Sixth Circuit itself put it, "[w]hether the Union should be joined . . . is . . . a matter for the District Court in the first instance, and we leave it to the district court to address the issue on remand should the parties or the district court wish to pursue it." *Id.* at 621 (internal quotation marks and citation omitted).

The Sixth Circuit did express, in *dicta*, reservations about the Seventh Circuit's holding, *id.* ("Nor is it clear to us that *Baker*'s suggestion is correct."), but *dicta* in one circuit questioning a holding in another circuit does not create a circuit split. The court's *dicta* does not bind future panels in

that circuit, *e.g.*, *United States* v. *Jenkins*, 4 F.3d 1338, 1345 n.8 (6th Cir. 1993); thus, it is utterly speculative whether the Sixth Circuit will ever decide the issue in a manner contrary to the Seventh Circuit (or, indeed, whether it will ever decide the issue at all). The Sixth Circuit noted that its reservations were contingent upon facts that it did not have before it – facts that will be placed before the district court on remand. See 370 F.3d at 621 (noting that it was unclear whether the terms of the collective bargaining agreement "require[d] the participation of the union"). Thus, not only is the Sixth Circuit's discussion *dicta*, it is *dicta* that stops short of a hard conclusion and that was issued without the benefit of briefing or argument concerning the law and underlying circumstances. There is no conflict here.

Moreover, the decision below rested not only on the Rule 19 ruling, but also on independent, adequate grounds. See Pet. App. 11 (even if plaintiffs were "to add the union as a party and start [the suit] anew," the case would have to be dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6)). Thus, decision of the Rule 19 issue would resolve neither a conflict nor even this case.

At best, accordingly, petitioners are asking this Court to expend its limited resources for nothing more than error correction. Even that insufficient argument would fail here, however, because there is no error for the Court to correct. Under Rule 19, a person "shall be joined as a party in the action if . . . in the person's absence complete relief cannot be accorded among those already parties." Fed. R. Civ. P. 19(a). The relief petitioners seek is the payment of wages different from those negotiated by their exclusive bargaining representative and set forth in the collective bargaining agreement, as well as an injunction somehow designed to prevent IBP from engaging in conduct in the future that may depress collectively-bargained wages. But, as the Seventh Circuit observed, IBP is "legally required to pay at the rates specified by the collective bargaining agreement." Pet. App.

10. "Without the union as a party, the litigants could not settle this suit for higher hourly pay . . . nor could the judge order IBP to increase its rate of pay." *Id.* at 10-11. It is thus clear that, without the union as a party, "complete relief cannot be accorded" petitioners, Fed. R. Civ. P. 19(a). See 7 Wright et al., *Federal Practice & Procedure* § 1620, at 316 (3d ed. 2001) ("[T]he union thus typically must be joined in employee-employer litigation involving the collective-bargaining agreement . . . .").

In expressing reservations about the Seventh Circuit's conclusion, the Sixth Circuit in *Trollinger* cited cases for the proposition that the union need not be joined to a suit to *enforce* a collective bargaining agreement. 370 F.3d at 621. But this is not a suit to enforce the collective bargaining agreement. The suit in this case seeks to *modify* the collective bargaining agreement by asking the Court, rather than the bargaining parties, to establish the hourly wage rates and to require IBP to pay its hourly work force a wage higher than the collectively-bargained rate. It is well established that in suits seeking the modification of the terms and conditions of a collective bargaining agreement, the union must be joined as a party. See *Forsberg* v. *Pacific N.W. Bell Tel. Co.*, 622 F. Supp. 1147, 1150 (D. Or. 1985) (ordering joinder of union where "plaintiff challenges specific terms of employment contained within the collective bargaining agreement and appropriate relief may require revision of those terms of employment"); *Lynch* v. *Sperry Rand Corp.*, 62 F.R.D. 78, 86 (S.D.N.Y. 1973) (ordering joinder of unions because "[h]aving negotiated with Sperry Rand over the contents of the collective bargaining agreements, the absent unions clearly have an interest in litigation which seeks to rewrite portions of those agreements"); *Hodgson* v. *School Bd.*, 56 F.R.D. 393, 395 (W.D. Pa. 1972) (ordering joinder of union where plaintiffs sought to "restructur[e] the compensation provisions of the collective bargaining agreement" by "increas[ing] the compensation of those certain of its

employees against whom it allegedly discriminates to the level of the other similarly situated employees"). Similarly, unions are routinely permitted to intervene as of right in litigation that might affect the terms and conditions of their collective bargaining agreements. See *EEOC* v. *AT&T*, 506 F.2d 735, 741-42 (3d Cir. 1974) (holding that union had a right to intervene because "its collective bargaining agreements with AT&T ... may well be modified or invalidated by the ... consent decree ... made in its absence"); *United States* v. *City of L.A., Cal.*, 288 F.3d 391, 400 (9th Cir. 2002) (same); *Little Rock Sch. Dist.* v. *Pulaski County Special Sch. Dist. No. 1*, 738 F.2d 82, 84 (8th Cir. 1984) (per curiam) (same).

II. THE SEVENTH CIRCUIT'S ALTERNATIVE RICO HOLDING IS CORRECT AND DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT OF APPEALS.

After mischaracterizing the Seventh Circuit's decision below, petitioners spend a great deal of time asserting a number of imagined splits between the Seventh Circuit and various courts of appeals over two questions of RICO law. Neither of these questions, however, was the subject of a holding by the Seventh Circuit in this case. In contrast, petitioners appear to have no complaint at all with the Seventh Circuit's actual RICO holding – that to state a RICO claim, the plaintiff must allege that a "person" separate from the RICO "enterprise" participates in or conducts the affairs of that enterprise through a pattern of racketeering activity. Thus, there is no split here, and even petitioners have not identified an error for this Court to correct.

Petitioners rely primarily upon defects and confusion inherent in their complaint – and not any deficiency in the Seventh Circuit's opinion – to support their assertion that the decision below creates a conflict. A § 1962(c) RICO claim requires that (1) a person (2) conduct the affairs of a distinct enterprise (3) through a pattern of racketeering activity. The

complaint can be viewed from two perspectives, but either way it alleges only two of the three required elements. Viewed from one perspective, the complaint alleges that IBP was conducting its own affairs through the racketeering activity. Here it fails to allege the requisite distinction between the "person" and the "enterprise." Alternatively, if the enterprise is the association in fact of IBP and outside recruiters, then that *enterprise's* affairs are not being conducted through a pattern of racketeering activity. Thus, as we now show, the decision below reflects established RICO jurisprudence that does not conflict with the law of any other circuit.

A. The Seventh Circuit Did Not Dismiss Petitioners' RICO Claim On The Ground That The Members Of The Enterprise Had Divergent Purposes.

Petitioners first contend that the Seventh Circuit created a split with several other circuits by holding that no RICO enterprise existed in this case because the members of the alleged enterprise had "divergent goals." Pet. 9 & n.13 (internal quotation marks omitted). It is true that the Seventh Circuit noted that the members of the alleged association-in-fact enterprise in this case had divergent goals. See Pet. App. 12 ("IBP wants to pay lower wages; the recruiters want to be paid more for services rendered (though IBP would like to pay them less); the Chinese Mutual Aid Association wants to assist members of its ethnic group. These are divergent goals."). It is clear, however, that the court did not *hold* that these divergent goals were fatal to petitioners' RICO claim.

Instead, on the way to its *actual* holding, the Seventh Circuit simply questioned whether the petitioners had alleged an association-in-fact enterprise at all. The Court noted that the "complaint *comes perilously close* to alleging that IBP plus its agents and employees is the 'enterprise,' a theory that won't fly," as well as that "*it is not altogether clear* how this 'association in fact' has a common purpose, an essential ingredient," Pet. App. 12 (emphases added). In neither case,

however, did the court hold that the enterprise failed for these reasons; the court's phraseology – "comes perilously close" and "not altogether clear" – shows that these are not holdings. Rather, the court "assume[d] that this congeries is a 'group of individuals associated in fact although not a legal entity'" – *i.e.*, that this congeries *is* an enterprise. *Id.* at 11 (quoting 18 U.S.C. § 1961(4)). Put differently, petitioners have based the bulk of their petition on an issue that the court ultimately resolved in their favor. Moreover, all of the circuits are in accord (as they must be in light of this Court's decision in *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 496-97 (1985)) with the Seventh Circuit's actual holding – that in order to state a RICO claim, plaintiffs must allege that a "person" different from the RICO "enterprise" conducted or participated in the affairs of that enterprise through racketeering activity.

Indeed, even if the Seventh Circuit had held that the alleged enterprise failed for lack of common purpose, there would be no split with any of the cases cited by petitioners. The principal case they rely upon, the Second Circuit's decision in *Commercial Cleaning Services, L.L.C.* v. *Colin Service Systems, Inc.*, 271 F.3d 374 (2d Cir. 2001), Pet. 8-9, nowhere addresses the question whether a RICO enterprise exists when its members have divergent purposes. The decision is *completely silent* on both the question whether there were divergent purposes in the enterprise and the question whether the divergence undermined the RICO claim. Such silence does not create a circuit split.[1]

---

[1] Petitioners also rely on the Second Circuit's decision in *United States* v. *Orena*, 32 F.3d 704 (2d Cir. 1994). Pet. 11-12. It is true that the court there said that the "existence of an internal dispute" does not *necessarily* spell the end of an enterprise for RICO purposes. 32 F.3d. at 710 ("Rivalry and dissension, however violent, do not necessarily signify dissolution of a conspiracy." (internal quotation marks omitted)). The Second Circuit's notion that divergent purposes are not *necessarily* fatal to a RICO enterprise is not inconsistent with the Seventh Circuit's surmise

Petitioners' reliance on the Eleventh Circuit's decision in *United States* v. *Beasley*, 72 F.3d 1518 (11th Cir. 1996) (per curiam), Pet. 15-16, is similarly misguided. Although the court noted that some members of the enterprise – there a religious organization – did not participate in the predicate offenses, 72 F.3d at 1526 n.7, the court nowhere considered whether all the members of the organization were fundamentally at odds, or, more to the point, whether the RICO claim was undermined for that reason. And, again, the decision is entirely consistent with the Seventh Circuit's actual RICO holding. See *id.* at 1525-26 & n.7 (observing that the Yahweh Nation was the "enterprise" but that only some of its members were the "persons" prosecuted under RICO).

Finally, petitioners cite a number of cases in which courts have held that a legitimate business may be both a victim of a RICO scheme and a part of the RICO enterprise, Pet. 17-18. The Seventh Circuit nowhere takes issue with or even addresses this proposition. Of course, a business can be both a victim and a *part* of a RICO enterprise, but the business cannot be both the RICO person and the entirety of the RICO enterprise. Here, as the Seventh Circuit explained, the complaint alleged only "that IBP operates *itself* unlawfully," and *failed* to allege that IBP somehow participated in or conducted the affairs of "a distinct entity or even a distinct association in fact." Pet. App. 12. Thus, the Seventh Circuit's decision is necessarily based on its conclusion that the only alleged racketeering activity was conducted through IBP alone, not through the separate association-in-fact enterprise that the court assumed plaintiffs had adequately

---

that the enterprise *in this particular case* might fail. Moreover, although the Second Circuit found that the divergence was not fatal in *Orena*, it did so because the "reason for[] the dispute [was] control of the enterprise." *Id.* The divergent purposes in this case, by contrast, do not go to control over the enterprise, but instead to the question whether there *is* a RICO enterprise whose affairs are being conducted through racketeering activity. Thus, there is no conflict between even the *dicta* in this case and *Orena*.

alleged. This does not conflict with cases holding that a legitimate business may be both a victim of and a participant in a RICO enterprise. The notion that *some* members of an organization (*e.g.*, the victims) may not know that other members are engaged in criminal activity is wholly consistent with the Seventh Circuit's musing that an enterprise might not lie *if all of its members operated at divergent purposes.*

In sum, the premise of petitioners' conflict argument rests on a misreading of the Seventh Circuit's decision. And, even assuming against reality that the Seventh Circuit relied on the divergent-purpose rationale, there is no conflict between its reasoning and the other decisions cited by petitioners.

B. The Seventh Circuit Did Not Dismiss Petitioners' RICO Claim On The Ground That The Members Of The Enterprise Were Akin To A Family Of Corporations.

Petitioners also appear to contend that the Seventh Circuit's decision is in conflict with a number of other circuits because it held that "the enterprise alleged here [was like] a family of corporations under common ownership," and, therefore, was not distinct from IBP, the alleged RICO person. Pet. App. 12-13 (noting that the Seventh Circuit had previously held that "no distinctness is present between a corporation and its subsidiaries" (citing *Bachman* v. *Bear, Sterns & Co.*, 178 F.3d 930 (7th Cir. 1999))).[2]

One would look long, hard and in vain, however, for such a statement in the Seventh Circuit's opinion. Nothing in the opinion even hints that the court saw the enterprise here as deficient because it consisted of IBP and its corporate subsidiaries. The court said the enterprise might fail to the extent it consisted of "IBP plus its agents and employees,"

---

[2] Although the petition is not altogether clear, it appears that petitioners cite cases from the First, Second, Third, Fifth, Sixth and Ninth Circuits on the other side of this alleged split. *See* Pet. 13-15.

Pet. App. 12. Petitioners' corporate-family contention appears to be based on utter speculation that the court was following an earlier Seventh Circuit case – *Bachman* – that the court did not even cite. Thus, all of the cases petitioners cite as conflicting with the Seventh Circuit's "family of corporations" holding, Pet. 13-15, are wholly beside the point.

Moreover, even if petitioners had based their argument on the potential flaw the Seventh Circuit *did* observe in their alleged enterprise – that the enterprise alleged was solely IBP and its agents and employees – it is clear, as noted above, that this was not a holding of the court. The court opined that "the complaint *comes perilously close* to alleging that IBP plus its agents and employees is the 'enterprise', a theory that won't fly," Pet. App. 12 (emphasis added), before basing its holding on an alternative ground. Nor do petitioners attempt to demonstrate that the court's actual view is either wrong or in conflict with decisions of other courts of appeals. In any event, as also noted above, the court ultimately resolved this issue in petitioners' favor by "assum[ing] that this congeries *is* [an enterprise]." *Id.* at 11 (emphasis added) (citing 18 U.S.C. § 1961(4)). Petitioners are complaining about the lower court's skeptical musings when they agree with its ultimate conclusion. This Court does not review *dicta*, particularly where, as here, petitioners ultimately received the benefit of the doubt.

C. Petitioners Agree That The Legal Rule Applied By The Seventh Circuit Is Correct (And Do Not Even Expressly Dispute Its Application).

As noted several times above, what the Seventh Circuit *actually* held in this case was that petitioner alleged an "'enterprise'" that was not distinct from IBP because IBP is the sole defendant and only IBP is alleged to have been conducted through the predicate RICO offenses. Pet. App. 12. And on this point, petitioners *agree* that the Seventh Circuit followed the proper legal rule: "Under the person-enterprise rule, a distinction must exist between the 'person'

and the 'enterprise.' If no distinction can be drawn, the two concepts collapse, and the pleading is improper for a failure to plead distinct entities." Pet. 12. Petitioners do not – and could not – allege that the circuits are in conflict concerning this legal rule. Moreover, in the petition, petitioners do not even address, let alone dispute, the Seventh Circuit's conclusion that IBP was both the RICO "person" and the only RICO "enterprise" that was being operated through the requisite racketeering activity. Finally, even if petitioners had argued that the Seventh Circuit misapplied the established legal rule in this case, that would fall far short of the Court's standards for certiorari review.

The RICO holding at issue is correct and is not the subject of a conflict. Given that the Seventh Circuit's RICO holding is independent of its necessary-party holding, the petition should be denied on this basis alone.

III. THIS COURT SHOULD NOT ABANDON ITS USUAL CRITERIA FOR CERTIORARI REVIEW BECAUSE THIS IS A CASE INVOLVING ILLEGAL IMMIGRATION.

In the lengthiest section of their brief, petitioners detail the many burdens on American society caused by illegal aliens, implying that illegal immigration is such an important issue that this Court should hear any case that would further enforcement of the immigration laws, whether or not the Court's traditional criteria for certiorari review are met. Like national security, civil liberties, separation of powers and federal jurisdiction, federal immigration policy is undoubtedly important. This Court, however, has never subscribed to the notion that petitions raising issues touching on important social policies such as illegal immigration or health care receive special treatment or are entitled to a thumb on the scale. Otherwise, all such cases would be taken up by the Court. Moreover, there are many ways of enforcing the immigration laws, including federal government enforcement; and this case presents only a narrow aspect of *private*

immigration-law enforcement. Petitioners thus engage in hyperbole when they claim that decision of the issue presented here will have a significant impact on immigration-law enforcement.

In fact, petitioners alleging immigration-law violations do not get a free ride; they must present a legal issue warranting review, and petitioners here have utterly failed to do so. The Seventh Circuit's decision is not the subject of a conflict among the courts of appeals. In applying the NLRA and RICO, the court applied legal rules that are correct and well established. This Court's scarce resources should not be squandered on a case that involves only a (wholly correct) application of established law that is not, and may never be, the subject of inter-circuit conflict.

At its core, Part III of petitioners' brief is an argument that RICO must always be interpreted as broadly as possible to "energiz[e] the enforcement of provisions of the immigration statutes by the use of private attorneys general." Pet. 18. Petitioners effectively say that any reading of the statutory text that does not serve Congress's purpose of enhancing private immigration-law enforcement must be wrong. See *id.* at 28. The Court has already rejected petitioners' preferred form of statutory interpretation, because "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U.S. 522, 526 (1987) (per curiam). See also *Board of Governors* v. *Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986) ("Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself . . . in the end, prevents the effectuation of congressional intent."). The Seventh Circuit read the text of RICO and applied that text as correctly and uniformly interpreted by the courts of appeals; and there is, accordingly, no need for this Court's review.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

DAVID B. JOHNSON
ERIC S. MATTSON
EMILY A. MILY
SIDLEY AUSTIN BROWN & WOOD LLP
Bank One Plaza
10 S. Dearborn Street
Chicago, IL 60603
(312) 853-7000

VIRGINIA A. SEITZ*
BRIAN T. FITZPATRICK
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Respondents

September 29, 2004

* Counsel of Record